

**IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION**

**JILL DILLARD, JESSA SEEWALD,  
JINGER VUOLO, and JOY DUGGAR**

**PLAINTIFFS**

**V.**

**CASE NO. 5:17-CV-05089-TLB**

**CITY OF SPRINGDALE, ARKANSAS;  
WASHINGTON COUNTY, ARKANSAS;  
KATHY O’KELLEY, in her individual and  
official capacities;  
ERNEST CATE, in his individual and official capacities;  
RICK HOYT, in his individual and official capacities;  
STEVE ZEGA, in his official capacity;  
BAUER PUBLISHING COMPANY, L.P.;  
BAUER MAGAZINE, L.P.;  
BAUER MEDIA GROUP, INC.;  
BAUER, INC.;  
HEINRICH BAUER NORTH AMERICA, INC.;  
BAUER MEDIA GROUP USA, LLC; and  
DOES 1-10, inclusive**

**DEFENDANTS**

**BRIEF IN SUPPORT OF RESPONSE TO PLAINTIFFS’ MOTION FOR LEAVE TO  
FILE AN AMENDED COMPLAINT ON BEHALF OF SEPARATE DEFENDANTS  
CITY OF SPRINGDALE, ERNEST CATE IN HIS INDIVIDUAL AND OFFICIAL  
CAPACITIES, AND KATHY O’KELLEY IN HER INDIVIDUAL AND OFFICIAL  
CAPACITIES**

Separate Defendants, Kathy O’Kelley, in her individual and official capacities, Ernest Cate, in his individual and official capacities; and the City of Springdale, Arkansas (collectively referred to herein as the “Springdale Defendants”); by and through the undersigned attorneys, for their Brief in Support of their Response to Plaintiffs’ Motion for Leave to File an Amended Complaint state:

**I. INTRODUCTION**

Plaintiffs filed their initial complaint in this matter on May 18, 2017, *see* Doc. 1. On June 29, 2017, the Springdale Defendants filed a motion to dismiss Plaintiffs’ claims against

them in their entirety as a matter of law and also pursuant to Fed. R. Civ. P. 12(b)(6), *see* Doc. 21. On September 29, 2017, this Court entered an Order (Doc. 62) granting in part and denying in part Springdale Defendants' Motion to Dismiss. In that Order, the Court dismissed all claims that were alleged against the Springdale Defendants except the claims against Kathy O'Kelley, in her *individual* capacity, ("O'Kelley") and Ernest Cate, in his *individual* capacity ("Cate"). On October 10, 2017, O'Kelley and Cate timely filed an interlocutory appeal of those remaining claims to the Eighth Circuit Court of Appeals, *see* Doc. 64, and a motion to stay (Doc. 65) all proceedings in the instant case. Plaintiffs failed to respond to the motion to stay and, the Court issued an Order Staying Case (Doc. 73) on October 25, 2017. Plaintiffs now seek leave to file an amended complaint, during the pendency of that stay.

As set forth in more detail below, this Court should deny Plaintiffs' Motion for Leave to File an Amended Complaint as to any claims reasserted against Springdale Defendants. The Motion for Leave should be denied because the [Proposed] Amended Complaint reasserts claims, without alteration, that have either already been dismissed by this Court or that are on interlocutory appeal to the Eighth Circuit Court of Appeals.

## **II. LEGAL ARGUMENT**

The Springdale Defendants request that the Court deny Plaintiffs' Motion for Leave to File an Amended Complaint as to any claims being reasserted against the Springdale Defendants. An amended complaint supersedes an original complaint and renders the original complaint without legal effect. *In re Atlas Van Lines, Inc.*, 209 F.3d 1064, 1067 (8th Cir. 2000). A plaintiff does not have an absolute or automatic right to amend a complaint, *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 224 (8th Cir. 1994) and district courts have "considerable discretion to deny a post judgement motion for leave to amend because such motions are

disfavored.” *Horras v. Am. Capital Strategies, Ltd.*, 729 F.3d 798, 804 (8th Cir. 2013) (citing *United States ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 824 (8th Cir.2009)). Further, if the amendment fails to cure a pleading defect and thus would be futile, good reason exists to deny the plaintiff leave to amend. *Williams*, 21 F.3d at 225.

Plaintiffs’ Motion for Leave to File an Amended Complaint and Incorporated Brief in Support suggests that Plaintiffs only seek to amend and clarify the factual allegations against the Bauer Defendants, *see* Doc. 74 at 3. While it is true that the [Proposed] Amended Complaint contains no new facts or claims against the Springdale Defendants, proposed amendment reasserts, without any alterations, Counts 5, 6, and 7 of the initial complaint. The Court has already rendered judgement on those exact claims as alleged against the City of Springdale and Kathy O’Kelley and Ernest Cate in their official capacities. Not only are such post-judgement motions disfavored, but the proposed amendment would also be futile because it does not cure the defects from the original complaint.

To the degree that claims remain against O’Kelley and Cate, those claims are on interlocutory appeal to the Eighth Circuit Court of Appeals. This Court has issued a stay on all proceedings pending the Eighth Circuit’s mandate regarding those claims. If Plaintiffs were allowed to file their [Proposed] Amended Complaint, the amended complaint would supersede Plaintiff’s original complaint and all claims that have already been dismissed by this Court would be reinstated against the Springdale Defendants. The Springdale Defendants would be forced to relitigate the exact claims that have already been entertained and dismissed by this Court. Such action would be futile and judicially inefficient.

Plaintiffs should not be allowed to reassert their identical claims against the City of Springdale, Arkansas or the individual Springdale Defendants in their official capacities that

have already been dismissed by this Court. Further, Plaintiffs should not be allowed to reassert identical claims against Kathy O’Kelly and Ernest Cate in their individual capacities while those claims are on interlocutory appeal at the Eighth Circuit Court of Appeals and during the pendency of a stay on all proceedings in this case.

### **III. CONCLUSION**

For the reasons set forth herein, the Springdale Defendants respectfully request that this Court deny Plaintiffs’ Motion for Leave to File an Amended Complaint as to the Springdale Defendants, and for all other just and proper relief.

Respectfully Submitted,

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DEFENDANTS**

**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that on the 8<sup>th</sup> day of November 2017, a true and correct copy of the above and foregoing Brief in Support of Response to Motion for Leave on Behalf of Separate Defendants was filed with the Clerk via the CM/ECF system which will send notification of filing to the following:

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